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February 26. 1771.

ANSWERS

FOR

JEAN WEIR, Daughter of the deceaſt JOHN WEIR Merchant in Edinburgh;

TO THE

PETITION of Sir ARCHIBALD DENHAM of Weſtſhiel.

CAPTAIN William Denham, brother-german of Sir William Denham of Weſtſhiel, died in June 1711, and Sir William himſelf died in 1712; to the funerals of theſe gentlemen John Weir merchant in Edinburgh, father to the reſpondent, furniſhed articles to the amount of 1348 l. 4 s. 2 d. Scots.

Sir William had executed an entail of his eſtate of Weſtſhiel, by which he called to the ſucceſſion, upon the failure of himſelf and the heirs of his body, Robert Baillie his nephew, and his heirs, whom failing, Archibald Stewart, another nephew of his, now Sir Archibald Denham of Weſtſhiel.

On the death of Sir William Denham without heirs of his body, the eſtate, in virtue of his entail, devolved upon Robert Baillie, who became Sir Robert Denham.

The reſpondent's father, Mr. Weir, it appears, made a demand for payment of his account, very ſoon after Sir William's death; but Sir Robert not being in a condition to pay it, he, of this date, which is about three months after Sir William's death, granted Mr. Weir a bond, of the tenor recited in the 3d page of the petition, which bond was, of this date, regiſtered in the books of ſeſſion.

May 3. 1712.

June 11. 1724.

The ſaid Sir Robert Denham lived down to ſometime between the 1720 and 1726; and in the 1719 the preſent Sir Archibald Denham, then Mr. Archibald Stewart, inſiſted in a proceſs againſt Sir Robert, for having it found that he had forfeited all right to the eſtate for himſelf and his heirs, becauſe of his having omitted to inſert the irritant and reſolutive clauſes in his retour.

Sir Robert having died during the dependance of this proceſs, it was transferred againſt his infant children, and decreet obtained againſt them in 1726; upon which the petitioner, Sir Archibald, got into poſſeſſion, in which he continued till the 1740. But Alexander, Sir Robert's ſon, upon his majority, having brought an appeal againſt the ſaid judgment, it was reverſed, and he reſtored to the poſſeſſion; but both he and his brother Robert having died without iſſue, the petitioner again in 1756 got into poſſeſſion of this eſtate as heir of entail.

In 1749 the reſpondent, as diſponee from her father, brought an action againſt the laſt Sir Robert Denham, who died in 1756, for payment of the ſums contained in the above bond. Sir Robert appeared to the action, and ſet furth, that he was willing to renounce being heir to his father; and a day having been allowed him for that purpoſe, the matter from that time lay over.

In the 1769, the reſpondent brought an action againſt the petitioner for payment of the ſum in the above bond, as heir of line, tailzie and proviſion, ſerved and retoured to the ſaid Sir William Denham of Weſtſhiel.

The cauſe having come in courſe before Lord Kennet, his
Feb. 16. 1770. Lordſhip, by his firſt interlocutor, found the defender is not liable for the funeral charges of Captain Walter Denham, but found him liable for the expence of Sir William Denham, the Tailzier, being L. 674: 2: 1 Scots, and decerned againſt him for payment thereof.

The petitioner preferred a repreſentation againſt this interlocutor, to which the reſpondent made anſwers, and alſo preferred a repreſentation on her part againſt the interlocutor, in ſo far as it found the petitioner not liable for the funeral charges of Captain Walter: as to which the reſpondent ſet forth in her repreſentation, that Captain Walter had, before his death in the 1711, granted a diſpoſition for love and favour to his brother Sir William of all goods, debts, &c. which ſhould pertain to him

him at his death, and particularly the ſum of L. 2000 Scots, contained in an heritable bond granted to him by Dame Mary Weir, Lady Clowburn; which diſpoſition is declared to be granted with the burden of all his debts; and the effects ſo diſponed to Sir William were by him aſſigned to his heirs of entail, and are at this day enjoyed by the petitioner, Sir Archibald Denham, as ſuch.

The petitioner, knowing what was ſet forth in this repreſentation to be true, put in no anſwers thereto; and the Lord Ordinary, of this date, pronounced the following interlocutor; Dec. 6. 1770.
'In reſpect that the defender has failed to give in anſwers to 'the purſuer's repreſentation, holds the facts therein ſtated as 'true; and decerns for the ſum contained in the accompt and 'bond lybelled, being L. 1348:4:2 Scots money, and inte-'reſt thereof from the 5th July, 1769, the date of the citation 'in this proceſs; and in time coming till payment.' And his Lordſhip afterwards refuſed ſeveral repreſentations for the petitioner, and adhered; againſt which judgments the petition now to be anſwered reclaims.

The petitioner argues in the firſt place, that the negative preſcription is run againſt any action competent againſt the repreſentatives of Sir William Denham, in conſequence of this claim being a debt payable out of his eſtate; for he ſays the *jus crediti* on that eſtate was direlinquiſhed, and the obligation innovated by the bond taken from Sir Robert Denham in the 1712; whereby, in place of its being an open account, upon which an action lay againſt the eſtate and executry of Sir William, which was valuable, and more than ſufficient to pay all his debts, the reſpondent's predeceſſor betook himſelf to a perſonal obligation againſt Sir Robert and his heirs whatſomever; and accordingly he ſays, the proceſs brought againſt Sir Robert in the 1749 concluded againſt him, not as the repreſentative of Sir William, or upon the footing of the debt being exigible out of the entailed eſtate, but upon the footing of Sir Robert's being the repreſentative of the granter of the bond upon the paſſive titles; and therefore the defence was, that Sir Robert was willing to renounce; which defence was ſuſtained, and a day aſſigned; and therefore the petitioner ſays, that was a *res judicata* in his favour, and that this proceſs cannot be conſidered as an interruption.

A great part of this argument is founded upon a wrong view

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of the nature of the ground of debt.—This debt or claim possibly might have been innovated, had the respondent's predecessor discharged his account, and taken a bond from Sir Robert for the amount simply, without mentioning the cause of granting: But as no innovation was intended, so nothing that had a tendency that way was done; the account was not discharged; nor was a simple bond taken from Sir Robert: On the contrary, the bond is subjoined to an account, which is expressly declared to be the ground of it; and that account is for the funeral charges of Sir William, and his brother Captain Walter; from which it is evident that this obligation did not extinguish, nor was meant to extinguish the claim against Sir William's estate for his funeral charges as a debt due by the Tailzier, and take in its place a personal bond from Sir Robert: The obligation has two effects;—First, as an attestation of the account being due by the immediate heir of entail; and then to that is added, a personal obligation upon that heir to pay the amount, which last does not sopite the other, but preserves it in full force.

As to the process 1749, it is true that it concluded for payment of the bond against the then Sir Robert, as the representative of the former Sir Robert, the granter of the bond: But it at the same time expressly libelled, that it was granted for necessaries furnished to the funerals of his deceased uncle Sir William Denham of Westshiel, and Captain Walter Denham, his brother-german; and therefore it is clear, this process was a document taken upon the debt; although it may be true that the proper answer was not made to the defence pleaded by Sir Robert. But as the action was brought for payment of the said bond as being the amount of the said funeral-charges, and that against Sir Robert Denham, who was Sir William's heir of entail, that action, however inaccurately libelled or conducted, must be sufficient to interrupt the prescription; for surely the demand for payment of a debt from the person who is the proper debtor, must be sufficient to interrupt prescription. Now Sir Robert was the proper debtor, both as being heir of entail to Sir William, and heir in general to his father, the former Sir Robert, the granter of the bond. That writing, as already said, afforded two claims; one against Sir William's estate and his heir of entail; another against the heirs whatsoever of Sir Robert the granter. This Sir Robert who was sued in 1749,

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united in his perſon both the character of heir of entail to Sir William, and heir-general to Sir Robert the granter; therefore, he was the proper, and indeed the only debtor; and as the debt was demanded from him by a proceſs, that muſt ſave the debt from preſcription, although, by reaſon of his not having entered heir-general to his father, there was a miſtake in the libel as to the character in which he was concluded againſt, for a judicial demand of the debt from the debtor muſt certainly avail to interrupt the preſcription.—If in a bond one be bound as principal, and another as cautioner, there can be no doubt that diligence done againſt any one of them will interrput the preſcription as to both. 'Negative preſcription is ſaved as to the 'whole, the creditor doing diligence againſt any one of the 'principals or cautioners.' Stair, 18 Dec. 1667, Nicolſon, &c. Dict. vol. ii. page 129. which is a caſe that applies to the preſent; for by the bond both Sir William's heir of tailzie, and Sir Robert's heir of line, were bound. Or ſuppoſe that a proceſs is brought againſt A as being the heir of B, who was cautioner for C in a bond, and it ſhould come out, that A, inſtead of being the heir of B the cautioner, is the heir of C the principal debtor, can it be maintained, that this miſtake as to the character of A would render the proceſs ineffectual for interrupting the preſcription *quoad* the principal? certainly not. For in order to interrupt preſcription, no more is neceſſary than that the creditor take a document upon his debt, and that the document be notified to the debtor.

The interlocutor in the proceſs 1749, ſuſtaining the defence that the then Sir Robert the defender did not repreſent the granter of the bond, can never be a *res judicata* to avail the petitioner or any body elſe: There could be no doubt, that if Sir Robert did not repreſent the granter of the bond, he could not be ſubjected to pay it as heir to him; but there can be as little doubt that he was liable to pay it as heir to Sir William, the maker of the entail, and the petitioner muſt be liable upon the ſame medium; and it is clear that Sir Robert in the year 1749, might have been obliged to pay the bond either upon a new proceſs againſt him as heir to Sir William, or upon an amendment of the libel that was raiſed, but in which the *medium concludendi* was erroneous.

As to what is ſaid of Sir William's executry, the reſpondent has no acceſs to know particularly. But it is obvious, his im-

mediate heir Sir Robert, the granter of this bond, muſt have been in ſtraits, otherwiſe he would not have allowed the funeral charges of his uncles to lye over: And from what has been already ſaid, it is obvious that the ſucceeding heirs of entail were all along in ſtraitened and diſtreſſed circumſtances; and this petitioner kept poſſeſſion of the eſtate many years, merely becauſe the ſons of the firſt Sir Robert, then minors, had not money to proſecute their appeal; not to mention that there was a liferent which almoſt totally covered the eſtate, and ſubſiſted till within theſe few years, all which very well accounts for the delay in proſecuting this claim.

The next defence inſiſted upon in this petition is, That the acknowledgement of Sir Robert, the immediate heir of entail and granter of the bond in queſtion, that Mr. Weir had furniſhed, to the extent therein mentioned, to the funerals of Sir William, and Captain Walter cannot be probative againſt the petitioner, a ſubſequent heir of entail, and that therefore, unleſs the furniſhings be *aliunde* inſtructed, he falls to be aſſoilzied; and, in ſupport of this defence, he refers to various judgments, which, he ſays, have been pronounced by the court in caſes analogous, which proceeded upon the principle on which he pleads, particularly in the caſe of bankrupts and inhibited perſons; who, tho' they may grant ſecurities validly for anterior debts, yet the anteriority muſt be inſtructed otherways than by their acknowledgement after the bankruptcy, or inhibition.

But, the reſpondent does not think it neceſſary to enter into a diſcuſſion of the general queſtion, or of the ſeveral deciſions referred to, which are not at all applicable to the caſe in hand, the ſpecial circumſtances of which leave no room for any doubts.

It is no doubt true, that if a deed, granted by an heir of tailzie was *per ſe* probative of the Tailzier's debt, that the heir colluding with his own creditors, might charge the eſtate with debts that were not the Tailzier's, but his own; and therefore, there may be reaſon for maintaining, that ſome other evidence, beſides the acknowledgement of the heir, would be requiſite, in order to make the debt good againſt the eſtate, as being the Tailzier's; but it is certainly carrying the matter much too far to maintain, that in every caſe the acknowledgement of the heir muſt go for nothing, and that the debt muſt be loſt to the creditor,

creditor, unleſs he can inſtruct *aliunde* that it was the Tailzier's. An heir of tailzie repreſents the Tailzier *paſſive*, and is liable for all his debts, at leaſt to the extent of the entailed eſtate, and upon his entry he becomes the proper debitor to the creditors of the Tailzier, and there is neither law nor reaſon why he ſhould not be allowed to act as other debtors.

Suppoſe, that an heir of entail ſhould grant a bond of corroboration for a certain ſum, which he acknowledges was due by the Tailzier to the perſon to whom the bond of corroboration was granted, there might be ſome reaſon for requiring evidence *aliunde* of the exiſtence of this debt, becauſe, the narrative is altogether general, and therefore ſuſpicious; and becauſe, if ſuch bond were to be ſuſtained, no doubt an heir of entail might charge the eſtate with as many debts as he pleaſed; or even ſuppoſe, that the narrative of ſuch bond of corroboration bore, that the Tailzier had been due a like ſum by a bond, a bill, or other voucher of the creditor, but when he came to ſeek payment from the ſubſequent heirs of entail could not produce that voucher, there might be ſome room for heſitation, even in that caſe.

But it would be puſhing matters much too far to maintain, that upon the Tailzier's death, his heir of entail could not validly atteſt or corroborate a ſum due by an open account, but that in every ſuch caſe it is incumbent upon the creditor, for preſervation of his debt, to prove his account, and take a decreet therefore, ſuch doctrine would be moſt unreaſonable. The heir of entail repreſents the Tailzier, and is *eadem perſona* with him; and upon his ſervice becomes the proper debtor, and therefore he may atteſt the account which he knows to have been due by the defunct; nay, there can be no doubt, that though ſuch account had been preſcribed, yet that the atteſtation of the immediate heir of entail acknowledging the juſtice of the debt, and obligation upon him to pay it, would bar the plea of preſcription in a queſtion with a ſubſequent heir of entail.

The circumſtances of the preſent caſe leave no room for ſuſpecting any colluſion, or raiſing any doubt about the juſtice of the debt. Where an heir of entail grants a bond of corroboration aſſerting, that the Tailzier owed ſuch a ſum in general, there may have been a colluſion in every ſuch caſe, between the heir and the creditor, if there is no other evidence but the aſſertion

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in the bond of corroboration, that the Tailzier ever owed ſuch a ſum, and no proof or preſumption ariſing *aliunde* that he did: But, in this caſe, there is an abſolute certainty that the Tailzier incurred the debt ſued for; or, at leaſt, incurred a debt of the ſame nature to ſome body or other; for it is certain that the Tailzier is dead; it is certain that he was buried, and that he could not be ſo without expence; conſequently it is certain that the Tailzier was debtor to ſome perſon or other for his funeral charges. The only queſtion therefore is, Whether or not it was the reſpondent's predeceſſor, Mr. Weir, that defrayed them? and of this there is ſufficient evidence ariſing from the recent acknowledgment and obligation of Sir Robert Denham, Sir William's immediate ſucceſſor, eſpecially as the petitioner does not pretend to alledge or inſinuate, that any other perſon was the undertaker of theſe funerals.

It is therefore plain, that the petitioner's arguments do not at all touch the preſent caſe, becauſe, *res ipſa loquitur*, there was no colluſion betwixt Sir Robert Denham and Mr. Weir, it being abſolutely certain Sir William muſt have incurred ſuch a debt as this; and that he incurred it to the reſpondent's author, is ſufficiently inſtructed by the atteſtation and obligation of his immediate ſucceſſor, both in the entailed lands and moveable eſtate, which were both deſtined to the ſame ſeries of heirs; ſo that it does not occur, how there well could be any temptation to, or *termini habiles* for colluſion; and therefore, ſuppoſing all the petitioner's general arguments were ſolid, it is evident they do not affect the preſent caſe.

In reſpect whereof, &c.

JO. MACLAURIN.